Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner,

v.

BEN CARTER, *Respondent.*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM R. MCCRACKEN
HARRIS, MCCRACKEN & JACKSON
505 Courthouse Lane
Augusta, Georgia 30901
(404) 722-3748
Attorneys for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

The Court of Appeals has not decided an important federal question in a way in conflict with applicable decisions of this Court.

Respondent prays that this Court deny the petition for writ of certiorari to review the writ of mandamus granted by a panel of the United States Court of Appeals for the Fifth Circuit in the above entitled case on May 30, 1980.

ARGUMENT

Petitioner seeks to invoke the review powers of this Court pursuant to Rule 19 of the United States Supreme Court Rules, wherein it maintains the Court of Appeals decided an important federal question in a way in conflict with the applicable decisions of this Court. Rule 19(1)(b), Supreme Court Rules.

Petitioner cites four decisions of this Court wherein it maintains the decision of the Court of Appeals is in conflict with decisions of this Court. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976); *Gravitt* v. *Southwestern Bell Telephone Co.,* 430 U.S. 723 (1977); *Browder* v. *Department of Corrections of Illinois,* 434 U.S. 257, 266 (1978). A careful reading of these cases clearly indicates there is no conflict with the decision of the Court of Appeals.

The Court of Appeals correctly followed the doctrine of *Gibbs, supra,* in that the Court of Appeals remanded this case to the District Court for the exercise of judicial discretion which the District Court had failed to exercise.

There is no conflict with the *Thermtron Products* case, *supra. Thermtron* is authority for respondent's position in that the remand was improper and without authority under 28 USC 1447(c) and 28 USC 1447(d).

In *Gravitt, supra,* the remand occurred prior to any final verdict or judgment. Respondent obtained a favorable ruling in a court with jurisdiction and the reversal of such a decision would raise serious questions regarding the review of his favorable verdict. To rule otherwise would encroach upon respondent's rights in that he would be denied a "due process property right" under the Fifth Amendment to the United States Constitution.

The case of *Browder* v. *Department of Corrections of Illinois, supra,* is likewise inapposite. There is no time specified in the statutes or in the applicable court rules within which a party may seek review of an order by way of "writ of prohibition and/or mandamus". Respondent is not bound to seek review in such a manner as petitioner would have him. Respondent has the right to seek review by any means available. This is what respondent elected to do and the review procedure he followed was approved by the Court of Appeals.

In its decision, the Court of Appeals interpreted the words "final judgment" when used in conjunction with 28 USC 1447(c) and 28 USC 1447(d). The Court of Appeals held no remand was proper after final judgment was read in connection with these statutes.

Petitioner removed the case from State Court to Federal Court on federal grounds and it additionally stipulated in the pre-trial order that jurisdiction was founded on diversity of citizenship. The Court of Appeals determined that the trial judge erred in its definition of "final judgment" and additionally in its conclusion that it was without jurisdiction. The Court of Appeals determined that the trial court had no au-

thority to remand the case to State Court after respondent had secured a favorable verdict.

The trial judge had clearly erred on the issue of jurisdiction, as well as the definition of "final judgment". Petitioner has no standing to invoke the rule of *Owen Equipment Erection Co.* v. *Kroger,* 437 U.S. 365. In *Kroger,* there was no jurisdiction. Here, there was jurisdiction throughout the entire proceedings. In *Kroger,* the claimant's successful verdict was defeated after judgment because there was no jurisdiction. In *Kroger,* the Court held that the constitutional mandates regarding jurisdiction took precedence even after final judgment and the doctrine of estoppel would not apply. Here the Court has been vested with jurisdiction throughout these proceedings and respondent, notwithstanding the above, should not be precluded from an assertion of an estoppel defense, among other defenses, to the claim of petitioner who seeks in a circuitous manner to void an otherwise valid judgment.

CONCLUSION

The Court of Appeals has not decided an important federal question in a way in conflict with the applicable decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

HARRIS, MCCRACKEN & JACKSON

By: /s/ WILLIAM R. MCCRACKEN
WILLIAM R. MCCRACKEN